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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

3154 S. 798

No. 792

SALLIE ESSARY, Executrix of the Estate of William H. Essary, Deceased,

Petitioner,

vs.

FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B. FLEMING, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a Corporation; and J. M. KURN and JOHN G. LONSDALE, Trustees of the Estate of St. Louis-San Francisco Railway Company, a Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA, AND BRIEF IN SUPPORT THEREOF.

Clarence C. Chilcott,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 792

SALLIE ESSARY, Executrix of the Estate of William H. Essary, Deceased,

Petitioner,

vs.

FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B. FLEMING, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a Corporation; and J. M. KURN and JOHN G. LONSDALE, Trustees of the Estate of St. Louis-San Francisco Railway Company, a Corporation.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The petition of Sallie Essary, Executrix of the Estate of William H. Essary, Deceased, for writ of certiorari directed to the Supreme Court of the State of Oklahoma to bring before the Supreme Court the case of *Sallie Essary, Executrix of the Estate of William H. Essary, Deceased, Petitioner,* v. *Frank O. Lowden, James E. Gorman and*

Joseph B. Fleming, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a corporation; and J. M. Kurn and John G. Lonsdale, Trustees of the Estate of St. Louis-San Francisco Railway Company, a corporation, Respondents, respectfully shows that:

Summary Statement.

This action was for the recovery of damages for the death of petitioner's decedent, William H. Essary, who was killed while in the employ of respondents. The action was brought under the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, Sections 1 to 8, 35 Stat. 65, 45 U. S. C. A. 51-59) and the Safety Appliance Act (Act March 2, 1893, c. 196, Sec. 2, 27 Stat. 531, 45 U. S. C. A. Sec. 2) (R. 3-9). A verdict was returned by the jury for respondents which was affirmed by the Supreme Court of Oklahoma upon the theory that the evidence was insufficient to show that the coupler which the switch foreman was unable to operate, and which it is alleged caused decedent's death, was defective, or that the manner in which he operated it had any causal connection with or contributed to the death of decedent (R. 211), or that the failure of said coupler to operate was a proximate cause of decedent's death (R. 211) and that the instructions while conflicting and confusing as a whole sufficiently advised the jury of the applicable principles of law to be applied to the facts as found by them from the evidence (R. 210).

There was no dispute as to the applicability of the Federal Employers' Liability Act, it being admitted in the pleadings (R. 23) and in open court (R. 27) that both decedent and respondents were engaged in interstate commerce at the time of decedent's death and that the rights, duties and liabilities of decedent and respondents were governed by said Act.

Decedent had been employed by respondents, Lowden, et al., and their predecessors for approximately 31 years as a brakeman or switchman (R. 124) and left a widow (petitioner) surviving him (R. 122).

At Clinton, Oklahoma, respondent maintained joint facilities and at the time of decedent's death the crew were employed by respondents, Lowden, et al., and were operating upon the main track of respondents, Kurn, et al. (R. 60-63, 157, 172-173).

Decedent was killed as the switch crew were endeavoring to cut off four cars from a drag of fourteen when the switch foreman gave a back-up signal, a stop signal, and attempted to operate the pin lifter of the coupler which failed to function (uncouple), and the four cars which were to be disconnected and kicked down the main line (R. 63-64, 74-75) stopped, and decedent was caused to fall from the front (north end) of the drag of cars (R. 31-32). The foreman then got up on the pin lifting lever with his feet, put his weight on it and signalled the engineer to give him some slack, which he did, whereupon, the pin was pulled and the coupler opened disconnecting the four cars (R. 63-76, 169-170), which then rolled down over decedent, killing him (R. 33).

In the interest of brevity petitioner does not give a full statement of the facts concerning decedent's death here as they will be fully set forth in her brief hereafter.

Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Sec. 237(b) of the Judicial Code as amended by Act of Congress February 13, 1925, Chapter 229, Sec. 1, 43 Stat. 937 (U. S. C. A., Title 28, Sec. 344) and particularly Sec. 344(b) thereof.

The judgment of affirmance sought to be reviewed was rendered June 10, 1941 (R. 207). A motion for rehearing

was denied September 9, 1941 (R. 212) and petitioner files her petition for writ of certiorari within three months from September 9, 1941.

This action was based upon the laws of the United States, to-wit, the Federal Employers' Liability Act (April 22, 1908, c. 149, Sections 1 to 8, 35 Stat. 65 (45 U. S. C. A. Sections 51 to 58), and the Safety Appliance Act (March 2, 1893, c. 196, Sec. 2, 27 Stat. 531 (45 U. S. C. A. Sec. 2).

The following cases it is believed sustain the jurisdiction of this Court to issue its writ of certiorari: *Chicago, G. W. R. Co.* v. *Basham,* 249 U. S. 146, 39 S. Ct. 213, 63 L. Ed. 534. *N. Y. Central R. Co.* v. *Marcone,* 281 U. S. 345, 50 S. Ct. 294, 74 L. Ed. 892. *Jenkins* v. *Kurn,* 313 U. S. 256, 61 S. Ct. 934, 85 L. Ed. 851. *Swinson* v. *Chicago, St. P. M. & O. Ry. Co.,* 294 U. S. 529, 55 S. Ct. 517, 79 L. Ed. 1041.

Questions Presented.

Petitioner respectfully urges the following questions arising under the Federal Employers' Liability Act and the Safety Appliance Act aforesaid:

1. Was there a violation of the Federal Employers' Liability Act?

2. Was the evidence in this case sufficient to sustain a verdict for petitioner under the Federal Employers' Liability and Safety Appliance Acts?

3. Was there sufficient evidence that the coupler in question was defective?

4. Was there sufficient evidence that the failure of the coupler to function was a contributing cause of decedent's death?

5. Were the instructions under which the case was submitted fundamentally and prejudicially erroneous?

Reasons Relied on for the Allowance of the Writ.

1. The Supreme Court of Oklahoma erroneously held as a matter of law that there was no evidence of a violation of the Federal Employers' Liability Act and erroneously stated in the opinion that such fact was admitted by petitioner (R. 210), whereas, when the parties are both engaged in interstate transportation and there is a violation of the Safety Appliance Act there is always a violation of the Federal Employers' Liability Act, as the violation of the former Act gives rise to an action under the latter, said violation supplying the gist of the action rather than the negligence of the respondents.

2. The opinion of the Supreme Court of Oklahoma is erroneous in holding that petitioner's evidence was insufficient to sustain a verdict for her. The court wholly failed to appreciate and evaluate her evidence, refers to the testimony of respondents' witnesses as the basis for its holding, ignores the testimony of petitioner's witnesses upon the same subject and the physical facts in the case. The test is not how, in the court's opinion, the preponderance of the evidence lies, but whether it is adequate to go to the jury and whether a jury might base an inference thereon and, if different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves.

3. The court erroneously held that the evidence wholly failed to show that the coupler operated by the switch foreman was defective (R. 211), whereas, the uncontradicted evidence for petitioner established that the coupler could not be operated in the usual and ordinary manner and that after the switch foreman attempted two or three times to operate it with his hand, he then climbed upon the car and was required to use his weight by stepping upon the

pin lifter in order to pull the pin and thus uncouple the cars.

4. The court erroneously held, and failed to give effect to the evidence supporting such fact, that there was no evidence that the failure of the coupler to function caused or contributed to decedent's death and erroneously states that it was petitioner's theory that the failure to operate the coupler resulted in a "violent jerk." This was not the case, it being petitioner's theory that the failure of the coupler to function caused the unexpected stopping of the car upon the front end of which decedent was standing, and that as a result thereof he lost his balance and fell in front of the moving cars.

5. The Supreme Court of Oklahoma undoubtedly held, as set out aforesaid, that there was insufficient evidence to take the case to the jury to avoid a review of the instructions given by the court which were thirty-two in number, the giving of which amounted to such plain and fundamental error that petitioner was denied the protection of the Federal Employers' Liability and Safety Appliance Acts.

Instruction No. 8 advised the jury that the Safety Appliance Act required the respondents to furnish couplers which "*cannot*" be uncoupled without the necessity of men going between the ends of the cars, whereas the contrary is the law (R. 188).

Instruction No. 9 erroneously required the jury to find as a condition necessary to recovery that the coupler was defective "*prior*" to the time of decedent's death, whereas, the law only required it to be defective at the time of his death (R. 188-189).

Instruction No. 12 erroneously informed the jury that it was the duty of decedent to exercise "*care*" to discover ex-

traordinary dangers arising from the negligence of his employer, whereas, assumed risk was abolished by the Safety Appliance Act (R. 190).

Instruction No. 14 completely eliminated the Safety Appliance and Federal Employers' Liability Acts from the case and submitted the case to the jury on common law negligence and required as a condition of recovery a finding that decedent be free from contributory negligence and assumed risk (R. 190-191).

Instruction No. 15 informed the jury that decedent assumed all of the ordinary risks of his employment as could have been known to him by the exercise of reasonable prudence and diligence, whereas, the contrary is the law (R. 191).

Instruction No. 21 erroneously submitted the cause of decedent's contributory negligence to the jury, whereas, said defense had been abolished by statute (R. 194).

Instruction No. 10 erroneously informed the jury that the whole "*gist*" of petitioner's cause of action was negligence, whereas, the violation of the Safety Appliance Act was the gist of her action (R. 189).

Instruction No. 17 erroneously informed the jury that decedent "assumed all of the risks and hazards incident to the employment" whereas the contrary is the law (R. 192).

The petition was in two counts and Instructions 11, 12, 14, 16, 18 and 21 were erroneously directed to both counts of the petition indiscriminately and, therefore, constituted plain or fundamental error as to Count I (R. 189-194).

By reason of the holding and judgment of the Supreme Court of Oklahoma petitioner has been denied a right and privilege which she specifically set up and pleaded under the Federal Employers' Liability and Safety Appliance Acts referred to aforesaid.

By reason of the foregoing the state court has decided Federal questions of substance in a way probably not in

accord with the applicable decisions of this Court, and in conflict therewith, and with cases in other State and Federal Courts.

Prayer.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued under the Seal of this Court directed to the Supreme Court of the State of Oklahoma commanding that court to certify and send to this Court for its review and determination on a day certain therein named a full and complete transcript of the records and proceedings in the case of *Sallie Essary, Executrix of the Estate of William H. Essary, Deceased, Plaintiff in Error,* v. *Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, a corporation; and J. M. Kurn and John G. Lonsdale, Trustees of the Estate of St. Louis-San Francisco Railway Company, a corporation, Defendants in Error,* No. 29922, to the end that this cause may be reviewed and determined by this Court as provided for in the Statutes of the United States, and that said decree and judgment of the Supreme Court of the State of Oklahoma may be reversed by this Honorable Court and that petitioner be granted a new trial, and for such other and further relief in the premises as to this Honorable Court may seem meet and just.

CLARENCE C. CHILCOTT,
Attorney for Petitioner.